



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 83 OF 2017**

TIMOTHY KAMAU MURAYA.....1<sup>ST</sup> PLAINTIFF

MARATA NYAWIRA KING'ORI.....2<sup>ND</sup> PLAINTIFF

**-VERSUS-**

JOHN MURIITHI KARIUKI.....1<sup>ST</sup> DEFENDANT

THE HONOURABLE ATTORNEY GENERAL .....2<sup>ND</sup> DEFENDANT

LAND REGISTRAR, NYERI.....3<sup>RD</sup> DEFENDANT

**RULING**

**A. INTRODUCTION**

1. By a plaint dated 17<sup>th</sup> May, 2017, the Plaintiffs sought the following reliefs against the Defendants:-

*(a) A declaration that Title No. Tetu/Unjiru/1397 is part of the estate of Martha Wangari Kagundu.*

*(b) An order directed to the 2<sup>nd</sup> Defendant to cancel the register and reinstate the name of Martha Wangari Kagundu as the registered owner of Title No. Tetu/Unjiru/697 or alternatively the 3<sup>rd</sup> Defendant be ordered to transfer the land to the name of the Plaintiffs to hold the same in trust for the estate of the deceased.*

*(c) An order of injunction restraining the 1<sup>st</sup> Defendant, his agents, servants and assigns from subdividing, selling transferring Title No. Tetu/Unjiru/697 or to do anything which will interfere with the said portion of land.*

*(d) An order of permanent injunction against the 1<sup>st</sup> Defendant restraining the said Defendant from continuing to occupy the suit property.*

*(e) Any other or further relief as this honourable Court may deem fit to grant.*

*(f) Costs of the suit.*

*(g) Interest at court rates.*

2. The Plaintiffs pleaded that all material times their deceased mother Martha Wangari Kagundu (*the deceased*) was the legitimate proprietor of Title No. Tetu/Unjiru/676 (*the suit property*). It was further pleaded that sometime in 2003 the Plaintiffs discovered that the 1<sup>st</sup> Defendant had unlawfully obtained registration of the suit property. The Plaintiffs therefore maintained the suit property was part and parcel of the estate of the deceased.

**B. THE PLAINTIFFS' APPLICATION**

3. By a notice of motion dated 8<sup>th</sup> April, 2019 brought under **Oder 40 rules 1 and 2 of the Civil Procedure Rules** the Plaintiffs sought an interim injunction to restrain the 1<sup>st</sup> Defendant from transferring, alienating, using, leasing or in any other way dealing with parcel Nos.

Tetu/Unjiru/3664-3680 (being sub-divisions of the suit property) pending the hearing and determination of the suit. The application was based on essentially the same grounds set out in the plaint. It was contended that the 1<sup>st</sup> Defendant had since subdivided the suit property and there was a danger of the same being disposed of during the pendency of the suit.

4. The application was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff, Timothy Kamau Muraya on 8<sup>th</sup> April, 2019 and the exhibits thereto. The Plaintiffs contended that there was a risk of the suit property being alienated with the risk that they shall suffer irreparable loss and damages. However, they did not disclose the nature and extent of loss and why the same was incapable of compensation by damages.

### **C. THE RESPONDENTS' RESPONSE**

5. The 1<sup>st</sup> Defendant filed a replying affidavit sworn on 29<sup>th</sup> April, 2019 in opposition to the said application. He stated that he had never been served with summons to enter appearance and suit papers in this suit even though it was filed about 2 years ago. He stated that he only learnt of the suit and application from a neighbor known as Lilian Mbogo. He contended that the suit was an abuse of the court process since there was a prior suit being Nyeri ELC No. 344 of 2014 in which his ownership of the suit property was affirmed and that the Plaintiffs had deliberately concealed such a material fact from this court.

6. The 1<sup>st</sup> Defendant further contended that the Plaintiffs herein were related to the Defendant in Nyeri ELC No. 344 of 2014. It was also contended that the 2<sup>nd</sup> Plaintiff was deceased and that the 1<sup>st</sup> Plaintiff had concealed that fact from the court. The court was consequently urged to discuss the said application with costs.

7. There is no indication on record of the Attorney General having filed any response on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the application even though he filed a defence in the suit.

### **D. SUBMISSIONS OF THE PARTIES**

8. The material on record indicates that the application was canvassed orally before Hon. Justice Waithaka on 30<sup>th</sup> April, 2019. The Plaintiffs' advocate prosecuted the application on the basis of the grounds set out in the notice of motion and prayed for an injunction to preserve the suit properties and its sub-divisions. The Plaintiffs submitted that they had satisfied the requirements for the grant of an injunction and urged the court to allow the application. On the other hand, the 1<sup>st</sup> Defendant opposed the application on the basis of the replying affidavit on record. It was submitted that the application was an abuse of the court process in view of the judgment of the court in Nyeri ELC No. 344 of 2014. The court was consequently urged to dismiss the application especially in view of the non-disclosure of the demise of the 2<sup>nd</sup> Plaintiff.

### **E. THE ISSUES FOR DETERMINATION**

9. The court has perused the Plaintiffs' notice of motion dated 8<sup>th</sup> April, 2019, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination:

(a) *Whether the Plaintiffs have satisfied the requirements for the grant of an interim injunction.*

(b) *Who shall bear costs of the application.*

### **F. ANALYSIS AND DETERMINATION**

#### **(a) Whether the Plaintiffs have satisfied the requirements for the grant of an interim injunction**

10. The principles for the grant of an injunction were enunciated in the case of **Giella v Cassman Brown and Co. Ltd [1973] EA 358** as follows:

(a) *An applicant must demonstrate a prima facie case with a probability of success at the trial.*

(b) *An injunction will not normally be granted unless the applicant demonstrates that he shall otherwise suffer irreparable loss or damage.*

(c) *Where the court is in doubt on (b) above it shall decide the application on a balance of convenience.*

11. It is evident from the plaint, witness statements and material on record that the Plaintiffs are seeking recovery of the suit property from the 1<sup>st</sup> Defendant on the basis that he acquired the same from the deceased illegally and fraudulently. It is evident that the Plaintiffs have not provided particulars of the alleged fraud and illegality in the plaint as required by law. The court has also noted that the legality of the 1<sup>st</sup> Defendant's acquisition of the suit property was the subject of litigation in Nyeri ELC No. 344 of 2014 whereby the 1<sup>st</sup> Plaintiff's cousin had filed a counterclaim based on the same grounds as those set out in the plaint in the instant suit.

12. The court is of the opinion that the judgment of the Environment and Land Court in Nyeri ELC No. 344 of 2014 was a judgment in *rem* in as far as it upheld the 1<sup>st</sup> Defendant's ownership of the suit property and held that there was no evidence to demonstrate that the 1<sup>st</sup> Defendant had acquired it illegally or fraudulently from the deceased. Although the current Plaintiffs were not parties to the suit, nevertheless, the doctrine of issue estoppel is applicable to stop them from litigating over the same issue which has already been adjudicated

upon and determined by a court of competent jurisdiction. In the premises, the court is not satisfied that the Plaintiffs have demonstrated a *prima facie* case with a probability of success at the trial.

13. The court has also considered the material on record against the 2<sup>nd</sup> principle for the grant of an injunction. Although the Plaintiffs alleged that they shall suffer irreparable loss which cannot be adequately compensated, they did not disclose the nature and extent of the alleged loss. They did not demonstrate why the award of damages would not be adequate compensation in the event that they were to succeed at the trial.

14. In the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] eKLR** the Court of Appeal considered the element of irreparable loss as follows:

**“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is, injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”**

15. The court is thus far from satisfied that the suit property is incapable of valuation or incapable of compensation by damages. The Plaintiffs have not demonstrated any unique, special or peculiar features which would make the suit property irreplaceable. Accordingly, the court finds and holds that the Plaintiffs have failed satisfy the second requirement for the grant of an interim injunction. In the event, there would be no need to consider the 3<sup>rd</sup> principle on the balance of convenience.

**(b) Who shall bear costs of the application**

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the 1<sup>st</sup> Respondent who participated in the application shall be awarded costs of the application.

**G. CONCLUSION AND DISPOSAL**

17. The upshot of the foregoing is that the court finds no merit in the Plaintiffs’ application for interim orders. Accordingly, the Plaintiffs’ notice of motion dated 8<sup>th</sup> April, 2019 is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30<sup>TH</sup> DAY OF JUNE 2021.**

**In the presence of:**

No appearance for the plaintiff

Mr. Nderitu for the Attorney General for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

No appearance for the 1<sup>st</sup> Defendant

Court assistant – Wario

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**Y. M. ANGIMA**

**ELC JUDGE**